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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA MEDINA, Defendant and Appellant.	B215939 (Los Angeles County Super. Ct. No. BA334143)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Jr., Judge. Affirmed.

Law Office of Christopher Nalls and Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant Joshua Medina guilty of assaulting Cesar Rivera with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1),[1] with the additional finding that defendant personally inflicted great bodily injury upon Rivera (§ 12022.7, subd. (a)). The trial court placed defendant on probation for a period of five years, conditioned in part on service of 364 days in the county jail.

In his timely appeal, defendant contends his trial counsel rendered constitutionally ineffective assistance by failing to present evidence that Rivera had previously threatened defendant's brother with a gun. We affirm.

STATEMENT OF FACTS

In the late morning of November 26, 2007, Cesar Rivera brought his car to an auto shop on Whittier Boulevard for repairs. Over the course of the day, while waiting for his car, he drank six 32-ounce beers. At approximately 6:30 p.m., Rivera saw defendant's brother, Sebastian, across the street from the shop, writing on the sidewalk. Rivera was acquainted with defendant and his family because they lived in the same apartment complex as Rivera's mother. "Some other guy" approached Sebastian and "had words with him." Sebastian walked toward a pay phone and began to write on the sidewalk again, when another person confronted him.[2] Sebastian walked away in the direction of defendant's nearby residence. Within a few minutes, he ran back to the Whittier Boulevard location, along with defendant, his parents, and girlfriend. Rivera remained at the auto shop across the street.

Defendant and his family crossed the street and confronted Rivera. The parents said it was Rivera's fault that Sebastian got "slapped around." The father was standing

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[1] All further statutory citations are to the Penal Code, unless stated otherwise.

[2] On cross-examination, Rivera testified that the second person who confronted defendant's brother was Rivera's friend, Robert.

approximately three feet from Rivera and leaning toward him. The mother and girlfriend were standing next to the father, with defendant standing behind his girlfriend. The family members repeatedly accused Rivera of sending the person to attack defendant's brother. Rivera denied knowing anything about it, telling them they were "full of shit" and demanding they leave him alone.

The confrontation continued for three to four minutes. Suddenly, the father came toward Rivera and defendant's mother swung a broom at him. Rivera pushed them away. As he did so, defendant struck Rivera's head with a metal object. When Rivera regained consciousness, he was in the auto shop with his sister and a mechanic was cleaning blood off his head. Defendant, his girlfriend, and his family were gone. The police and ambulance had arrived. Rivera was taken to the hospital, where he stayed for two days and received 17 stitches to his wound and other treatments. Ten days later, he returned to have the stitches replaced with staples.

When paramedic Daniel Ramirez of the Los Angeles Fire Department arrived at the scene, Rivera was conscious and able to explain what had happened. Ramirez dressed Rivera's head wound. It was a three-inch long laceration. The wound was consistent with blunt force trauma. Ramirez was not able to determine what kind of hard instrument was used, but it could have been an automobile bumper. The weapon would have been a hard object, but not likely a fist.

Officer Ricardo Verduzco of the Los Angeles Police Department arrived at the scene at approximately 7:00 p.m. Rivera's head was bleeding profusely. Rivera told the officer that defendant struck him and told him where defendant lived. The officer went to defendant's residence, but was told by defendant's mother that he was not home. Neither the mother nor the father would speak about the incident. The victim said he had been struck with a three-foot metal pipe, but the officer could not find such an instrument in the vicinity of the incident. The officer found "fresh" graffiti in the area where Rivera saw defendant's brother.

Rivera admitted that he was involved in an "incident" with one of defendant's brothers on May 5, 2006, near defendant's residence. As a result, Rivera served nine

months in prison. Rivera believed defendant and his family were responsible for his going to prison, and that they were "dishonest" in the way they handled the prosecution. Rivera did not believe the prison term was justified, but he felt no anger and bore them no ill will. In a separate matter, Rivera was convicted of possessing burglary tools in 2004.

Defense

Defendant testified on his own behalf that at the time of the incident, he lived on South Breed Street with his parents and two brothers. Rivera lived in the same building, on the same floor. Defendant had a good relationship with Rivera. Defendant knew about an incident that occurred between his brother Sebastian and Rivera.

On November 26, 2007, defendant's father told him that Sebastian had been punched in the face after going to the store. Sebastian said the assailant was a "bald guy" wearing a "homeboy T-shirt." Defendant, feeling upset, went to investigate with his parents, brothers, and girlfriend. Defendant's father was using crutches. When he arrived at the intersection of South Breed and Whittier Boulevard, defendant did not see anyone matching the description given by Sebastian. His parents saw Rivera at the auto shop and crossed the street to talk to him. Defendant remained where he was and watched as Rivera became increasingly aggressive, screamed, and pushed his father down onto the ground. Rivera picked up a metal bumper, held it over the father's head, and appeared ready to strike defendant's father, who was on the ground. Defendant ran across the six lanes of Whittier Boulevard and pushed Rivera away. The bumper fell on Rivera's head, causing him to bleed. As defendant helped his father, Rivera began to scream at him: "You better watch your back . . . I'm going to get you." Defendant saw a stranger running down the street and, thinking the person was associated with Rivera, defendant felt "threatened for [his] life." When defendant brought his parents home, he told them he was leaving because he felt threatened.

Defendant admitted a petty theft offense when he was 17 years old, about five years before the trial. Defendant's action toward Rivera at the auto shop had nothing to do with seeking revenge for Rivera's prior conduct against his family.

DISCUSSION

Defendant contends his Sixth Amendment right to counsel was violated by trial counsel's failure to present evidence that approximately 18 months before the underlying incident, Rivera threatened defendant's brother with a firearm and was incarcerated as a result. As we explain, his claim fails because defendant fails to overcome the presumption that counsel's decision was the product of a reasonable tactical choice.

Before testimony began, the defense moved to introduce evidence of Rivera's prior violent conduct and incarceration to show Rivera was biased against defendant and his family, and Rivera had a motive to present false testimony. The prosecution objected on Evidence Code section 352 grounds, arguing that to the extent the prior confrontation and resulting imprisonment were relevant as to bias, testimony as to the nature of Rivera's conduct in brandishing a firearm was unduly prejudicial. Defense counsel responded that the evidence was not only relevant to show bias, but to show Rivera's tendency to commit acts of violence.

The trial court tentatively ruled that Evidence Code section 1103, subdivision (a), would permit the defense to present evidence of Rivera's violent character to prove conduct in conformity with that character trait; however, subdivision (b) would permit the prosecution to counter such testimony with evidence as to defendant's character for violence, if any existed.[3] Therefore, if the defense wanted to present the proffered

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[3] Evidence Code section 1103 provides in relevant part: "(a) In a criminal action, evidence of the character or a trait of character . . . of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence

evidence merely to show bias, it would be admissible on a limited basis whereby the specific act of brandishing would not be admitted. On the other hand, if the defense wanted to admit the specific conduct in order to show the victim's violent character, the prosecution would likely be able to counter with evidence as to defendant's prior violent acts.[4] Defense counsel decided to follow the former course and not "mention the fact that it is a firearm, but [only] the fact that someone in the family had made a complaint against [Rivera] . . . that led to him . . . spending considerable amount of time in custody" for the purpose of showing Rivera's anger against defendant's family and his motivation to falsely testify against defendant. The court ruled that defendant's questioning would be limited to eliciting that Rivera had a "prior encounter with the victim's family which resulted in" the victim's serving time in prison.

At the close of evidence, the court raised the possibility of instructing the jury with two of the optional paragraphs in the pattern instruction for self defense (CALCRIM No. 3470)—to the effect that defendant's knowledge that the victim had threatened or harmed others in the past may be considered in determining whether the defendant's conduct and beliefs were reasonable, and that "[s]omeone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person." The defense requested the instruction, but the prosecution objected on the ground that there was no evidence that the prior incident between Rivera and defendant's brother involved violence. The court refused to give the optional paragraphs of the instruction.

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adduced by the defendant under paragraph (1). [¶] (b) In a criminal action, evidence of the defendant's character for violence . . . is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)."

[4] The prosecution represented that defendant's "rap sheet," which had been provided to defense counsel, listed a battery conviction and an arrest for brandishing a firearm.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694; *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*People v. Cunningham, supra,* at p. 1003.)

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland v. Washington, supra,* 466 U.S. at p. 690; *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*People v. Cunningham, supra,* 25 Cal.4th at p. 1003, citing *People v. Kraft, supra,* 23 Cal.4th at pp. 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Given the presumption of reasonableness proper to direct appellate review, our Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases '"'the record on appeal

sheds no light on why counsel acted or failed to act in the manner challenged . . . .'"' [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 526.)

Far from showing the absence of any reasonable tactical basis for counsel's actions, the appellate record demonstrates that counsel managed to introduce evidence that Rivera had suffered a nine-month term of incarceration arising out of an "incident" with defendant's brother. As counsel intended, this provided strong evidence of Rivera's bias against defendant, which supported the reasonable inference that Rivera was lying in order to exact revenge against defendant. While evidence of prior violent conduct by Rivera might have helped the defense to some degree, it would likely have come at the very substantial cost of allowing the prosecution to present evidence of defendant's own violent history pursuant to Evidence Code section 1103. This quintessentially the kind of tactical choice that Sixth Amendment precedent leaves to counsel's independent judgment. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington, supra,* 466 U.S. at p. 689; see also *People v. White* (1981) 118 Cal.App.3d 767, 779 (conc. opn. of Wiener, J.) ["Although Monday morning quarterbacking may be stimulating, it is inappropriate when judging lawyers who deal in the demanding and uncertain turf of the courtroom."].)

Defendant is mistaken when he argues trial counsel would have avoided the prospect of having defendant's prior act of violence being admitted as rebuttal evidence of character by presenting Rivera's prior threatening conduct for a purpose other than showing the victim's propensity for violence under Evidence Code section 1103—that is, to prove the reasonableness of his mental state in acting in defense of another. (See e.g., *People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065 (*Minifie*) ["'To justify an act of self-defense for [an assault charge under section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him.' [Citation.]"].) Of course, as defendant correctly points out, evidence of a victim's violence toward third

persons is generally admissible to show the defendant was in reasonable fear of his or her life (*People v. Spencer* (1996) 51 Cal.App.4th 1208, 1220), and evidence of threats by third parties whom defendant reasonably associated with the victim is generally relevant to prove a defendant's the state of mind in claiming self-defense. (*Minifie, supra,* at pp. 1065-1069.)

However, the mere fact that evidence of Rivera's prior act of violence might have been admitted to show the reasonableness of defendant's mental state in believing it necessary to defend his father would *not* have foreclosed the possibility that defendant's prior act of violence would have properly been found admissible as rebuttal character evidence under Evidence Code section 1103. As the trial court explained in *People v. Walton* (1996) 42 Cal.App.4th 1004,[5] a materially indistinguishable argument was rejected in *People v. Clark* (1982) 130 Cal.App.3d 371, 384,[6] where the court stated: "'Defendant argues, however, he did not intend to prove the victim's character for violence—he only sought to show his personal knowledge of the victim. We reject such a contention. The evidence introduced by defendant was directly probative of the victim's character for violent behavior on the fatal day. In view of this evidence neither the court nor the prosecution was required to accept defendant's representation that he intended only to prove his personal knowledge of the victim. We find no error in the introduction of the character evidence in rebuttal.' [Citations.]" (*People v. Walton, supra,* at p. 1015.)

Nor is defendant correct in asserting the evidence of Rivera's prior threat could only have helped his prove his defense. From the appellate record, it seems obvious that testimony to the effect that the prior threat gave defendant special reason to fear for his father's life would have likely entailed damaging cross-examination as to why defendant permitted his parents to cross the street to confront Rivera in the first place if defendant truly believed Rivera had such a propensity for violence. If defendant's testimony is to

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5 Disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, footnote 3.

6 Disapproved on another ground in *People v. Blakely* (2000) 23 Cal.4th 82, 92.

be believed, he watched the events unfold from across a six-lane boulevard and made no attempt to come to his father's aid until Rivera pushed the father to the ground and picked up a car bumper and raised it over his head in a menacing manner. Accordingly, defendant's testimony is at odds with a typical justification for presenting evidence of prior victim threats—to prove "whether defendant's knowledge of those threats justified quicker and, perhaps, harsher action than would be expected from a person who had not received similar threats." (*People v. Pena* (1984) 151 Cal.App.3d 462, 477.) By the time defendant said he took action, no reasonable person would doubt that his father was in mortal danger, and the prior act of violence against defendant's brother would have had little relevance to the proffered defense.

In sum, far from "eliminat[ing] the possibility that counsel's omission was tactical" (*People v. Montiel* (1993) 5 Cal.4th 877, 914), the appellate record supports the inference that counsel's challenged conduct made good tactical sense. Because this is not a case in which we can be confident the only reasonable course would have been to present evidence of Rivera's prior threatening conduct, we must reject defendant's Sixth Amendment claim. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582; accord, *People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.